STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
TELEPHONE (916) 323-7715
FAX (916) 323-3387
www.boe.ca.gov

June 17, 2002

Honorable David A. Cardella
Merced County Assessor
2222 'M' Street
Merced, CA 95340

Attention:
Assistant Assessor

Re: Revenue and Taxation Code Section 63.1 Calculation
For the One Million Dollar ($1,000,000,000) Exclusion

Dear Mr. Cardella:

This is in response to your May 1, 2002, letter to Ms. Kristine Cazadd wherein you enclosed a copy of an April 24, 2002, letter to you from a local attorney concerning parent-child transfers. In your letter, you state:

> " ... he feels we should consider 'equity' when determining whether a person has exceeded their one million dollar limit under a Prop. 58 transfer. We know of no section in the Revenue and Tax Code where 'equity' is a criterion for such determination. Please read said letter and give us your opinion in this matter."

According to the attorney's letter:

"Apparently, the basis for this assessment is that Mrs. M has exceeded the One Million Dollars ($1,000,000.00) lifetime exemption for Prop. 13 gifting that is excluded from reappraisal. Since Mr. M and his wife were the last ones to have their gift recorded they are the ones being assessed....

"First, I do not believe that an excess of One Million Dollars ($1,000,000.00) of gifts have in fact taken place. Most of the properties that were gifted were in fact co-owned by Mrs. M and her children. Over the years, she had loaned money to each of them to be paid back and only gifted partial amounts to the children....

"X X X

> " ... I do however believe that the total values of the properties should not be considered as part of the transfer because the children actually purchased several of the properties with the mother and their equity was used as their "down payment". [Mrs.] M simply took the properties into her name because she was the most 'credit worthy' of the folks in these various transactions. As a result, [Mrs.] M should not be considered to have transferred the entire property to her children since they already owned an equitable interest in the property. But, should only be considered to have transferred the interest actually possessed by her.
>
> X X X"

As we understand the quoted portion of the last paragraph of the attorney's letter, above, he is saying that Mrs. M and her children purchased real properties over the years; for each purchase they jointly pooled their funds, assets, etc. for use as the "down payment"; Mrs. M took title to each property in her name alone "because she was the most 'credit worthy'"; and, as the result, when she later transferred those real properties to her children, only the values of those interests in the real properties owned by her should be included in the section 63.1 One Million Dollar ($1,000,000.00) calculation, not the total values of the real properties transferred. In other words, the real properties were jointly-owned by Mrs. M and her children. Only the portions owned by Mrs. M and transferred to her children should be considered within the One Million Dollar exclusion. The other interests owned by the children should not be counted, because the children were getting back their respective interests in the real properties, not just receiving Mrs. M's interests therein.

For the reasons hereinafter indicated, it is our opinion that if Mrs. M, her children, and/or the attorney can establish that the real properties were purchased by Mrs. M and her children, but that Mrs. M took and held legal title to the properties for herself and her children, such that upon the transfers of the real properties to her children Mrs. M was really only transferring her interests in the properties to her children and returning the children's interests in the properties to them, only the values of Mrs. M's interests in the real properties should be included in the section 63.1 One Million Dollar ($1,000,000.00) calculation. If Mrs. M, her children, and/or the attorney cannot establish joint beneficial ownership, then the total values of the real properties transferred are properly includable in the section 63.1 calculation as transfers from parent to children.

As you know, Revenue and Taxation Code section 63.1 provides, in part: “(a) Notwithstanding any other provision of this chapter, a change in ownership shall not include the following purchases or transfers for which a claim is filed pursuant to this section: . . . [¶] (2) The purchase or transfer of the first one million dollars ($1,000,000) of full cash value of all other real property of an eligible transferor in the case of a purchase or transfer between parents and their children.”

Thus, the primary question is whether Mrs. M purchased the real properties and then transferred them to her children, in which case Mrs. M was the sole owner of the properties and

was transferring all of the interests in them to her children, or whether both Mrs. M and her children purchased the real properties but Mrs. M took and held legal title to the properties for herself and her children, such that upon the transfers of the real properties to her children, Mrs. M was really only transferring her beneficial interests in the properties to her children and returning the children's legal title in the properties to them. In this latter case Mrs. M would have been only a part owner of the properties and thus, transferring only her partial interests in the properties to her children. Questions regarding legal and beneficial title are answered by examining all the evidence as to the properties' ownership. If the evidence established, for example, that Mrs. M took title to the real properties in trust or subject to a holding agreement(s) for her children, then the assessor could conclude that Mrs. M's transfers of the real properties were transfers for purposes of section 63.1 only to the extent of her beneficial interests in the real properties, not transfers of the entire properties, and the parent-child exclusion would be allowable for those partial transfers. Mrs. M's transfers of the children's portions of the properties to the children would be transfers of mere legal title of their interests in the real properties to themselves, and as such, not changes in ownership.

With respect to the issue of the nature of the ownership interests transferred in a particular real property transaction, Property Tax Rule 462.200 (18 Cal. Code of Regs. §462.200) authorizes assessors to rely on the deed presumption which provides:

> "(b) DEED PRESUMPTION. When more than one person's name appears on a deed, there is a rebuttable presumption that all persons listed on the deed have ownership interests in property, unless an exclusion from change in ownership applies.
>
> In overcoming this presumption, consideration may be given to, but not limited to, the following factors:
>
> (1) The existence of a written document executed prior to or at the time of the conveyance in which all parties agree that one or more of the parties do not have equitable ownership interests.
>
> (2) The monetary contribution of each party. The best evidence of the existence of any factor shall be an adjudication of the existence of the factor reflected in a final judicial finding, order, or judgment. Proof may also be made by declarations under penalty of perjury (or affidavits) accompanied by such written evidence as may reasonably be available, such as written agreements, canceled checks, insurance policies, and tax returns."
>
> In addition, Evidence Code section 662 provides:
>
> "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."
> Clear and convincing proof has been defined as:

> "clear, explicit and unequivocal", "so clear as to leave no doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind." (1 Witkin, *Calif. Evid.* (3d ed. 1986) §160, p. 137)

In *Toney v. Nolder* (1985) 173 Cal.App.3d 791, the plaintiff claimed an interest in real property based on his contention that he and the defendant had an oral partnership agreement. The court held that there is no exception to the standard set forth in Evidence Code section 662 and the plaintiff was required to meet the clear and convincing evidence standard. Under these legal principles, the names appearing on a deed are presumed to own not only legal title to the real property but also beneficial ownership. This presumption can be overcome only by proof that is clear and convincing, that is, evidence that is explicit, unequivocal and leaves no doubt.

However, the following is also applicable to and may be helpful in this situation:

> "It is well established that although a conveyance of lands is absolute in terms, and on its face purports to convey an estate in fee, it may nevertheless be shown that the lands are held by the grantee in trust; and that the terms of such trust may be shown by oral testimony. In order, however, that the lands so conveyed may be impressed with a trust, the trust must be created and its terms agreed upon by the parties to the instrument at the time of its execution, or the instrument must be executed in pursuance of a previous agreement. Furthermore, the evidence that will authorize a court to find that a conveyance of lands which is absolute in terms was, in reality, made upon a trust must be clear, satisfactory and convincing. The parties to an instrument which is clear and unambiguous in its terms must be presumed to have intended the legal effect of those terms, unless it is clearly and satisfactorily shown that it was their mutual intention that those terms should have a different effect. The burden of proof to thus vary the terms of the instrument is on the party claiming contrary thereto, and he must establish his allegations by a preponderance of the evidence. The issue is purely one of fact (*Sherman v. Sandell*, 106 Cal. 373, 374-375 [39 P. 797])." J*ose v. Pacific Tile & Porcelain Co.* (1967) 251 Cal.App.2d 141, 144.

It is the role of the assessor to ultimately evaluate the facts to determine the sufficiency and import of the evidence. Utilizing the standards set forth above, particularly paragraphs (1) and (2) of Rule 462.200(b), if the assessor concludes that the presumption is rebutted (based on other documents, tax returns, including those of the children, sources of funds for the purchases of the properties, insurance for the properties and payments therefor, etc.), then the children obtained beneficial ownership interests in the properties together with Mrs. M, and Mrs. M held both beneficial and legal title as to her interests in the properties but only legal title as to the children's interests. It is possible that the deeds to the real properties were accompanied by "oral trusts" in favor of the children with respect to their interests in the properties, or by a "holding agreement(s)" whereby Mrs. M agreed to hold title to the children's portions of the properties on behalf of the children. In either case, the transfers would be considered transfers only Mrs. M's interests in the real properties to children for purposes of the parent-child exclusion.

In addition, section 63.1, subdivision (c)(9), provides that the transfer of that portion of the property subject to trust could constitute a transfer subject to the parent/child exclusion: for purposes of the section, "transfer" includes "any transfer of the present beneficial ownership of

property from an eligible transferor [e.g., a parent] to an eligible transferee [e.g., a child] through the medium of an intervivos or testamentary trust." In these regards, Property Tax Rule 462.160 provides that the following transfers do not constitute changes in ownership:

> "(b)[¶](4) The transfer is one to which the parent-child ... exclusion applies, and for which a timely claim has been made...
>
> "X X X
>
> "(d)[¶](5) Termination results in a transfer to which the parent-child ... exclusion applies, and for which a timely claim has been filed as required by law."

In regard to "oral trusts," a trust in real property is within the statute of frauds, and generally must be in writing. Probate Code § 15206. An oral trust in real property, however, is not void, but only *unenforceable* when its invalidity is urged by the party to be charged. Hence, only the trustee and his successors may take advantage of the statute. *Cardoza v. White* (1933) 219 Cal. 474, 476. Further, an oral trust is enforceable if the beneficiary, with the consent of the trustee, enters into possession or makes improvements, or changes position in reliance upon the trust. *Haskell v. First Nat. Bank* (1939) 33 Cal.App.2d 399, 402; *Mulli v. Mulli* (1951) 105 Cal.App.2d 68, 73; J*ose v. Pacific Tile & Porcelain Co.* (1967) 251 Cal.App.2d 141, 144. See also Property Tax Annotation No. 220.0583, C 3/8/2000, copy enclosed.

In Matter of Torrez, (1988) 63 B.R. 751, 827 F.2d 1299, the court reaffirmed the exception to the requirement of a writing for resulting trusts:

> "Under California law, resulting [oral] trust is implied by operation of law whenever a party pays the purchase price for a parcel of land and places title to the land in the name of another."

However, it is well settled that the elements proving both the existence and the validity of a resulting trust must be established by the party asserting its existence. In ParkMerced Co. v. City and County of San Francisco, (1983) 149 C.A.3d 1091, the court stated on page 1095,

> "... Today it is not at all uncommon for individuals, or corporations such as title companies, to hold "bare legal title" to property for the owner of its beneficial interest. Such a transaction is of the nature of a resulting trust "which arises from a transfer of property under circumstances showing that the transferee has no duty other than to deliver the property to the person entitled thereto, upon demand. And such a transfer, when made, will be of the property's "bare legal title" to the person already entitled to its "beneficial use."
>
> "We are brought to a consideration of the uncontroverted material evidence of the case. [¶] ... The partnership was formed for the purpose of acquiring and operating Parkmerced. The partnership agreement provided in part that title to Parkmerced would be held by one of the partners, Parkmerced Corporation, as nominee for the partnership. The transaction's documents were executed by Parkmerced

> Corporation "on behalf of the partnership," and title to the property was taken in Parkmerced Corporation's name as nominee of, and as authorized by, the partnership."

Whether or not the similar types of facts of a resulting trust exist in the instant case is a question of fact to be determined by the assessor upon the examination of all the available evidence. Mrs. M and/or the children must establish that Mrs. M took and held title to the properties for herself and her children and was the "trustee" of the children's interests in the real properties under an oral or resulting trust at the times of recordation of the deeds to the properties in Mrs. M's name. They must also establish that Mrs. M transferred bare legal title of the children's interests in the properties to the children only as a "trustee."

In regard to finding the existence of a holding agreement(s) between the parties, Rule 462.200 (c) contemplates a holding agreement as an arrangement created by a transfer of title from a principal (seller) to the holder of title (Mrs. M, here) on behalf of the principal or a third party (e.g. children, here).[1] This would require the existence of a written agreement between the sellers of the real properties and Mrs. M indicating that at all times Mrs. M was subject to the terms of the holding agreements, was permitted to hold record title only to the children's interests in the properties, and that all beneficial use and control of the children's interests in the properties remained in the children. Since no such agreement or other writing, formal or informal, has been submitted or referenced in your letter, we will assume for purposes of this analysis that the taxpayers will seek to prove that any holding agreements were oral in nature. An "oral" holding agreement necessitates establishing a "resulting trust", discussed above, in which Mrs. M received title to the children's interests in the properties as the nominee of the children.

If you conclude that the deeds transferring the real properties to Mrs. M must be accepted at face value, i.e., the presumption is <u>not</u> rebutted, then only Mrs. M has any beneficial interest in the properties prior to her transfers of the properties to the children. Those transfers would, therefore, result in changes in ownership of the entire properties, and under those circumstances, the total values of the real properties transferred would be included in the section 63.1 calculation.

If, on the other hand, you conclude that the presumption is rebutted and the deeds transferred only legal title as to the children's interests in the real properties to Mrs. M, then the children had equitable or beneficial ownership of interests in the properties, either as the beneficiaries of the oral trust or under a holding agreement, and they were the owners of those interests for property tax purposes. Only the values of Mrs. M's interests in the properties should

---

[1] Rule 462.200(c) provides: **"(c) HOLDING AGREEMENTS.** A holding agreement is an agreement between an owner of the property, hereafter called a principal, and another entity, usually a title company, that the principal will convey property to the other entity merely for the purposes of holding title. The entity receiving title can have no discretionary duties but must act only on explicit instructions of the principal. The transfer of property to the holder of title pursuant to a holding agreement is not a change in ownership. There shall be no change in ownership when the entity holding title pursuant to a holding agreement conveys the property back to the principal.
(1) There shall be a change in ownership for property subject to a holding agreement when there is a change of principals.
(2) There shall be a change in ownership of property subject to a holding agreement if the property is conveyed by the holder of title to a person or entity other than the principal."

be included in the section 63.1 calculation. Under this determination, the transfer to the children of their interests in the properties by the deeds would be considered a transfer of mere legal title and, therefore, not a change in ownership, per Property Tax Rule 462.240. See also Property Tax Rule 462.160.

Again, Mrs. M, her children, and her attorney bear the burden of proof with respect to the existence of any oral or resulting trust or any holding agreement. The standard of proof is clear and convincing evidence as previously discussed.

The views expressed in this letter are advisory only; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Very truly yours,

/s/ James K. McManigal, Jr.

James K. McManigal, Jr.
Tax Counsel IV

Enclosure [Annotation 220.0583 (C 3/8/2000)]

JKM:lg
Precdent/Parchild/02/05jkm.doc

cc: Mr. David Gau, MIC:63
Chief PPSD, MIC:64
Ms. Jennifer Willis, MIC:70